#### No. WD 61268

#### IN THE

#### MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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## STATE EX REL. FORD MOTOR COMPANY, THE BUDD COMPANY, AND COOPER TIRE & RUBBER COMPANY

Relators,

-VS-

# THE HONORABLE JOHN R. O=MALLEY, JUDGE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,

Respondent.

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#### RELATORS=BRIEF

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#### JURISDICTIONAL STATEMENT

This action involves a question of whether Respondent, Honorable John R. O-Malley, can take any further action except to transfer the underlying case, Case No. 99CV-227608 entitled *Dewey J. Johnson et al. v. Ford Motor Company et al.*, from Jackson County to a county where venue is proper. In their Amended Petition, plaintiffs named both corporations and an individual as defendants. None of the defendants named in plaintiffs-Amended Petition are residents of Jackson County, Missouri and the cause of action did not accrue in Jackson County. Therefore, venue is improper in Jackson County pursuant to Mo. REV. STAT. ' 508.010. This Court has jurisdiction of this writ proceeding under Article V, Section 4 of the Missouri Constitution.

#### **STATEMENT OF FACTS**

#### A. Plaintiffs=First Lawsuit

Plaintiff Dewey J. Johnson allegedly suffered injury on July 9, 1993 while inflating a tire he had taken off his truck. (See Relators= Petition for Writ of Mandamus (ARelators=Writ@, & 1)). On July 2, 1998, Dewey Johnson and his wife Connie Johnson, filed their Petition (APetition 1@) naming Ford, Budd, Cooper, and Max House as defendants. (See Relators=Writ, & 1). Individual defendant House filed a motion to dismiss based upon the innocent seller statute, Mo. REV. STAT. ' 537.762. (See Relators=Writ, & 2). Plaintiffs did not object to House-s dismissal and he was dismissed without prejudice. (See Relators=Writ, & 2). Ford, later joined by the remaining defendants, filed a Motion for Improper Venue, objecting to venue in Jackson County because, pursuant to ' 508.010, no defendants were residents of, and the cause of action did not accrue in, Jackson County. (See Relators=Writ, & 3). After extensive briefing by both sides, the Jackson County Circuit Court determined venue in Jackson County was improper and ordered the case transferred to Phelps County. (See Relators=Writ, & 3). After exhausting all avenues of review, plaintiffs submitted to Phelps County whereupon the parties began discovery. (See Relators=Writ, && 4 & 5). Just prior to the dates set for the depositions of plaintiffs and other witnesses, plaintiffs dismissed the action without prejudice. (See Relators=Writ, & 5).

#### B. <u>Plaintiffs=Second Lawsuit</u>

On December 7, 1999, plaintiffs re-filed their Petition (the Abandoned Petition®) in Jackson County, naming only corporate defendants. Less than twenty-four hours later, on December 8, 1999, plaintiffs filed their First Amended Petition (the Amended Petition®), adding individual defendant House. As a result, the Amended Petition contains allegations against the same defendants as did plaintiffs=Petition 1, upon which the court had previously found venue in Jackson County to be improper. (See Relators=Writ, Exhibits 1, 10, 11). Because the Amended Petition was served simultaneously with the Abandoned Petition, defendants were not given an opportunity to respond in any way to the Abandoned Petition.

Defendants=filed a Motion to Dismiss for Improper Venue or, in the Alternative, to Transfer and Suggestions in Support arguing venue in Jackson County is improper based on the allegations set forth in plaintiffs=Amended Petition. (Almproper Venue Motion 2®). (See Relators=Writ, & 9; Exhibit 14). This motion was denied by Respondent on October 9, 2001. (See Relators=Writ, & 9; Exhibit 16). In denying defendants=motion, Respondent found that a case is Abrought,® for venue purposes, at the time the original petition is filed. Therefore, Respondent=s decision to deny defendants= Improper Venue Motion 2, was based on the Abandoned Petition.

After Respondent's decision denying defendants=Improper Venue Motion 2, the Missouri Supreme Court decided *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001). (See Relators=Writ, &11; Exhibit 17). In *Linthicum*, the court resolved the issue of when a case is Abrought@for purposes of venue. The court held that under '508.010, Aa suit

instituted by summons is brought=anytime a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition.@ *Id.* at 858.

Based on the Missouri Supreme Court=s decision, on October 30, 2001, Relators filed a Motion for Reconsideration of Order Denying Defendants=Motion to Transfer for Improper Venue and Suggestions in Support (AMotion for Reconsideration®); (See Relators=Writ & 11). In their Motion, Relators argued that under *Linthicum*, Respondent must determine venue based on plaintiffs=Amended Petition and not the Abandoned Petition.<sup>1</sup>

At the same time, recognizing that *Linthicum* requires the transfer of the underlying case, plaintiffs filed a novel Motion for Leave to Revive Original Petition for Damages or, in the Alternative, for Leave to File Second Amended Petition and Suggestion in Support Thereof (Amotion to Revive.) (See Relators=Writ, & 12; Exhibit 19). Plaintiffs requested that Respondent allow them to revive their Abandoned Petition or allow them to

<sup>1.</sup> If venue is determined from the Abandoned Petition, ' 508.040 governs venue since only corporate defendants are named in that petition. On the other hand, if venue is determined from the Amended Petition, ' 508.010 governs venue since it names corporations and an individual as defendants.

again amend their Amended Petition to drop House, ultimately resulting in a petition that names corporate defendants only. (*Id.*)

On February 14, 2002, Respondent issued his Order denying Relators=Motion for Reconsideration and granting plaintiffs=Motion to Revive Original Petition. (See Relators=Writ, & 13; Exhibit 20). Respondent recognized that under *Linthicum*, venue in Jackson County is improper. (See Relators=Writ, Exhibit 20). However, in his Order, Respondent stated that *Linthicum* did not apply retroactively to the underlying case.

On April 9, 2002, Relators filed a Petition for Writ of Prohibition with this Court. In response, Suggestions of Respondent and Plaintiffs in Opposition to Defendants= Petition for Writ of Prohibition were filed by Respondent and plaintiffs. This Court issued its Preliminary Writ of Prohibition on April 26, 2002, enjoining Respondent Afrom taking any further action in this case except that Respondent may vacate the order to revive the original petition and Respondent may order a change of venue to the appropriate county. Respondent filed an Answer to the Preliminary Writ stating the writ should be vacated.

For the reasons set forth herein and in Relators=Petition for Writ of Prohibition and Suggestions in Support, the Preliminary Writ should be made permanent. The underlying case has absolutely no connection with Jackson County, Missouri: plaintiffs are residents of Phelps County; the accident occurred in Phelps County; and, under ' 508.010, none of the corporate defendants are residents of Jackson County. Relators respectfully request this Court to make its Preliminary Writ of Prohibition permanent and prevent Respondent from taking further action on this matter other than transferring it to a county where venue is proper.

#### **POINTS RELIED ON**

1. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE UNDER THE MISSOURI SUPREME COURT-S DECISION IN *LINTHICUM*, VENUE MUST BE DETERMINED FROM PLAINTIFFS= AMENDED PETITION AND UNDER PLAINTIFFS= AMENDED PETITION, VENUE IS IMPROPER IN JACKSON COUNTY, MISSOURI.

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc. 2001).

Mo. REV. STAT. ' 508.010.

State ex rel. Miracle Recreation Equipment Co. v. O=Malley, 62 S.W.3d 407 (Mo. banc 2001).

State ex rel. Landstar Ranger, Inc. v. Dean, 62 S.W.3d 405 (Mo. banc 2001).

2. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE RESPONDENT ERRED IN NOT APPLYING LINTHICUM TO THE UNDERLYING CASE IN THAT THE COURT IN LINTHICUM INTERPRETED A PROCEDURAL STATUTE AND DECISIONS REGARDING PROCEDURAL RULES ARE PROPERLY APPLIED RETROACTIVELY.

Sumners v. Sumners, 701 S.W.2d 720 (Mo. 1985).

Mendelsohn v. State Board of Registration, 3 S.W.3d 783 (Mo. banc 2000). State ex rel. Peabody Coal Co. v. Powell, 574 S.W.2d 423 (Mo. banc 1978). Wellner v. Director of Revenue, 16 S.W.3d 352 (Mo. Ct. App. 2000).

3. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE EVEN IF THE SUMNERS THREE-PART TEST COULD BE APPLIED TO THE UNDERLYING CASE, RESPONDENT ERRED IN FINDING THE LINTHICUM DECISION DOES NOT APPLY RETROACTIVELY IN THAT APPLICATION OF THE SUMNERS TEST FAVORS RETROACTIVE APPLICATION.

Sumners v. Sumners, 701 S.W.2d 720 (Mo. 1985).

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc. 2001).

Hoffman v. Hoffman, 676 S.W.2d 817 (Mo. banc 1984).

4. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE RESPONDENT ERRED IN ALLOWING PLAINTIFFS TO REVIVE THEIR ORIGINAL PETITION IN THAT THE PETITION WAS ABANDONED AND AN ABANDONED PLEADING IS A NULLITY.

Leis v. Massachusetts Bonding & Ins. Co., 125 S.W.2d 906 (Mo. Ct. App. 1939).

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998).

Evans v. Eno, 903 S.W.2d 258 (Mo. Ct. App. 1995).

DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. banc 1991).

#### STANDARD OF REVIEW

Relators seek this writ on the ground Respondent has misconstrued or misapplied the law with respect to venue pursuant to Mo. REV. STAT. ' 508.010. Where the claim is that the trial court misconstrued or misapplied the law, the appellate court reviews the trial court=s decision on a de novo basis. *See*, *e.g.*, *McGhee v. Dickson*, 973 S.W.2d 847, 848 (Mo. banc 1998); *Fishman v. Joseph*, 14 S.W.3d 709, 715 (Mo. Ct. App. 2000).

#### **ARGUMENT**

Plaintiffs in the underlying lawsuit<sup>2</sup> filed their First Amended Petition against defendants Ford Motor Company (AFord®), The Budd Company (ABudd®), Cooper Tire and Rubber Company (ACooper®), and Max E. House d/b/a Southside Motors (AHouse®) in the Circuit Court of Jackson County. It is undisputed that the accident giving rise to the cause of action involved in this lawsuit did not occur in Jackson County, Missouri. It is also undisputed that actions in which corporate and individuals are named as defendants, as in plaintiffs=First Amended Petition, Mo. REV. STAT. ' 508.010, the general venue statute, applies to determine venue. Under ' 508.010, venue in the underlying action is improper in Jackson County, yet Respondent refuses to transfer the underlying case to a county in which venue is proper.

<sup>2.</sup> The underlying suit is captioned *Johnson v. The Budd Company, et al.*, Case No. 99-CV-227608.

#### FIRST POINT RELIED ON

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE UNDER THE MISSOURI SUPREME COURT=S DECISION IN *LINTHICUM*, VENUE MUST BE DETERMINED FROM PLAINTIFFS= AMENDED PETITION AND UNDER PLAINTIFFS= AMENDED PETITION, VENUE IS IMPROPER IN JACKSON COUNTY, MISSOURI.

# A. Pursuant To *Linthicum*, Venue Must Be Determined From Plaintiffs= Amended Petition

Pursuant to the Missouri Supreme Court=s recent decision in *Linthicum*, a case is Abrought@each time a defendant is added to the case and, therefore, in the underlying case, venue must be determined from plaintiffs= Amended Petition. On October 23, 2001, the Missouri Supreme Court handed down *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc. 2001), finally resolving the issue of when a case is Abrought@for purposes of venue. This decision is dispositive of the venue issue in the underlying case.

In *Linthicum*, plaintiff filed her original action in St. Francois County against individual defendant Giles, a Butler County, Missouri resident. *Id.* Later, plaintiff amended her original action, adding two corporate defendants. *Id.* In the middle of discovery, plaintiff dismissed her action without prejudice. *Id.* Plaintiff later re-filed her lawsuit in the City of St. Louis, naming as the only defendant Harold Linthicum, an employee of Giles. *Id.* Because

defendant Linthicum was the sole defendant and a non-Missouri resident, plaintiff claimed that venue in St. Louis City was proper based upon her original petition. *Id.* The following day, however, plaintiff amended her petition, adding Giles, the two corporate defendants from her first dismissed action in St. Francois County, and two other defendants. <u>Id.</u> Linthicum and Giles filed a motion to transfer venue, which was denied. *Id.* They then filed a petition for writ of prohibition to the Court of Appeals, Eastern District, which was also denied. *Id.* The petition for writ was re-filed in the Missouri Supreme Court, where a preliminary writ was issued and later made absolute. *Id.* 

The *Linthicum* circuit court found that a lawsuit is Abrought@for purposes of '508.010 when the original petition is filed and, therefore, the original petition is the basis upon which venue is determined. *Id.*<sup>3</sup> The Missouri Supreme Court disagreed, stating that under the

<sup>3.</sup> The circuit court based its decision on *DePaul Health Center v. Mummert*, 870 S.W.2d 820 (Mo. banc 1991). In *DePaul*, the plaintiff filed a medical malpractice action in the City of St. Louis against an individual physician and two corporations. Because plaintiff named corporations and an individual as defendants, ' 508.010 applied to determine venue. Each of the defendants was a resident of, and the cause of action accrued in, St. Louis County. One of the defendants, however, conducted business in St. Louis City, a venue plaintiff felt was more favorable. In an attempt to have ' 508.040 apply, plaintiff dismissed the individual defendant. The court held that venue in St. Louis City was improper because the case was brought against the individual defendant; plaintiff could not dismiss a defendant to effectuate venue where it

circuit court=s reasoning, defendants would have different venue rights depending on whether they were initially named in the original lawsuit or subsequently added. *Id.* at 857. The Missouri Supreme Court held, A[f]or purposes of section 508.010, a suit instituted by summons is >brought=whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. *Id.* The Missouri Supreme Court then remanded the case to the circuit court to determine venue based on plaintiffs=amended petition. *Id.* 

#### B. Under Plaintiffs= Amended Petition, Venue Is Improper in Jackson County

In the underlying case, plaintiffs=Amended Petition names both corporations and an individual as defendants and, therefore, ' 508.010, the general venue statute, applies to determine venue. *See State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. banc 1996) (Section 508.010 of the Missouri Revised Statutes sets forth proper venue for suits in which corporations and individuals are named as defendants); *Mummert*, 889 S.W.2d at 824 (Mo. banc 1994) (same). Section 508.010 provides, in pertinent part:

Suits instituted by summons shall, except as otherwise provided by law, be brought:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within

would not have been proper initially.

which the plaintiff resides, and the defendant may be found;

- (2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;
- (3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in which any defendant resides;
- (6) In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties. . . .

Mo. REV. STAT. 508.010.

For purposes of this statute, a corporation Aresides@in the county in which it has its registered office or registered agent. *State ex rel. Riley v. McHenry*, 801 S.W.2d 779, 781 (Mo. Ct. App. 1991) (AWhen one or more corporations are sued along with one or more individuals. . .the county of residence of corporations in such circumstances is the county in which they maintain their registered office.@); *State Farm Mutual Automobile Ins. v. Ryan*, 766 S.W.2d 727, 728 (Mo. Ct. App. 1989) (AA foreign corporation is licensed to do business in Missouri resides=in the county where its registered office and registered agent is located.@)

Under plaintiffs=Amended Petition and ' 508.010, venue is improper because none of the defendants are residents of Jackson County and the cause of action did not accrue there. For purposes of ' 508.010, both plaintiffs are residents of Phelps County. Budd is a Michigan corporation, having no registered agent in Missouri. Cooper is a Delaware

corporation, whose registered agent, C.T. Corporation, is located at 120 South Central Avenue, Clayton, St. Louis County, Missouri. Ford is a Delaware corporation whose registered agent is The Corporation Company at 7733 Forsyth Boulevard, Suite 640, Clayton, Missouri, St. Louis County, Missouri. Individual defendant House is a Missouri citizen who operates his automotive sales business in and resides in St. James, Phelps County, Missouri.

Note that the defendant is a resident of Jackson County. Therefore, under '508.010, venue in the underlying case is improper in Jackson County. If venue is improper in the county where an action is brought, prohibition lies to bar the trial court from taking any further action except to transfer the case to a county of proper venue. State ex rel. Reedcraft Mfg. v. Kays, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998); State ex rel. Quest Communications v. Baldridge, 913 S.W.2d 366 (Mo. Ct. App. 1996). Therefore, the preliminary writ issued in this case should be made permanent.

#### C. Respondent Erred In Not Applying Linthicum

In his most recent Order, Respondent acknowledged *Linthicum*, but stated it did not retroactively apply to the underlying case.<sup>4</sup> *Linthicum* and its progeny do not support such a finding. In *Linthicum*, the court remanded the case to the circuit court for venue to be determined in accordance with its decision. This fact alone suggests the court intended for the decision to apply retrospectively to cases in which venue was currently in dispute. If the court

<sup>4.</sup> By doing so, Respondent implicitly acknowledges that venue in Jackson County would not be proper under *Linthicum*.

had intended for the decision to be prospective-only, it would not have remanded the case for further proceedings in light of its decision. Decisions from the Missouri Supreme Court since *Linthicum* also refute Respondent=s finding that the *Linthicum* decision should not be applied retroactively.

In State ex rel. Miracle Recreation Equipment Co. v. O-Malley,<sup>5</sup> a venue dispute similar to the one in the underlying case arose in the Circuit Court of Jackson County, Missouri. 62 S.W.3d 407 (Mo. banc 2001). In the original petition, plaintiff, a Missouri resident, named only Roberts, an Iowa resident, as a defendant. Id. at 407. Roberts removed the case to federal court. Id. While in federal court plaintiff added Miracle Recreation Equipment Company (AMiracle®), an Iowa corporation with its principal place of business in Barry County, Missouri, as a defendant. Id. Diversity was thereby destroyed and the case was remanded to Jackson County. Id. After remand, the defendants sought a change of venue, asserting that the addition of Miracle as a defendant resulted in improper venue in Jackson County. Id. The defendants=motion was overruled by the court. Id.

Miracle and Roberts sought a writ of prohibition or mandamus from the Missouri Supreme Court, alleging Jackson County was no longer a proper venue due to the addition of Miracle as a defendant. *Id.* In response, the Missouri Supreme Court stated A[a]t the time the trial court ruled on the motion to transfer, it did not have the benefit of this Court=s opinion in [Linthicum].@ Id. The court then granted the writ of mandamus and remanded the

<sup>5.</sup> Respondent in the case at bar was also Respondent in the *Miracle Recreation* case.

case to the trial court with an order Ato determine venue in accord with *Linthicum.® Id.* Under similar facts, the court held likewise in *State ex rel. Landstar Ranger, Inc. v. Dean*, 62 S.W.3d 405 (Mo. banc 2001) (after plaintiffs amended their petition to add additional defendants, defendants moved to transfer the case to proper venue, which the circuit court denied; Missouri Supreme Court remanded, directing the trial court Ato determine venue in accord with *Linthicum.®* 4 Id.

Obviously, based on the *Linthicum* decision itself and on Missouri Supreme Court decisions since *Linthicum*, Missouri courts must apply that decision to cases pending

<sup>6.</sup> It should be noted, the defendants in *Landstar Ranger* did not request the circuit court to reconsider its order denying the motion to transfer after *Linthicum*, but rather, defendants proceeded directly to the Missouri Supreme Court with a writ. Here, Relators provided Respondent a chance to reconsider his Order in light of the *Linthicum* decision. Unfortunately, Respondent acknowledges *Linthicum* and acknowledges venue in Jackson County is improper under *Linthicum*, but refuses to apply that decision to the underlying case.

in Missouri courts in which venue is disputed or was incorrectly decided based on erroneous interpretations of the general venue statute. The decision does not apply only to cases filed after the date of the decision. Nowhere in the *Linthicum* decision does the court infer that the decision should be applied prospectively-only and, furthermore, the Missouri Supreme Court has dispelled any such interpretation with its decisions in *Miracle Recreation Equipment Co*. and *Landstar Ranger*.

Respondent has exceeded his jurisdiction by refusing to apply *Linthicum* to the underlying case. Pursuant to *Linthicum*, venue must be determined from plaintiffs=Amended Petition, which names both corporations and an individual as defendants. Accordingly, venue is governed by ' 508.010 and venue is improper in Jackson County. The Preliminary Writ should be made permanent and Respondent should be ordered to take no further action regarding this case other than to transfer it to a county in which venue is proper.

#### SECOND POINT RELIED ON

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM
TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO
TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE RESPONDENT
ERRED IN NOT APPLYING LINTHICUM TO THE UNDERLYING CASE IN THAT THE
COURT IN LINTHICUM INTERPRETED A PROCEDURAL STATUTE AND DECISIONS
REGARDING PROCEDURAL RULES ARE PROPERLY APPLIED RETROACTIVELY.

D. Respondent Erred In Applying the Sumners Three-Part Test Because

Linthicum Interpreted A Procedural Statute

In his Order overruling Defendants= Motion for Reconsideration, Respondent refused to apply the *Linthicum* case to the underlying case, stating that the *Linthicum* decision should not be applied retroactively. In doing so, Respondent analyzed *Linthicum* in light of the three-factor test set forth in *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985). The *Sumners* test was created to aid courts in determining whether decisions of the Missouri Supreme Court regarding substantive issues should be applied prospectively-only. Respondent erred in applying the three-part test to *Linthicum*.

It is well established in Missouri that decisions affecting procedural rules apply retroactively. *See Mendelsohn v. State Board of Registration*, 3 S.W.3d 783, 786 (Mo. banc 2000) (AProcedural laws Brelating to the machinery for process in the causes of actionBmay apply retrospectively.®); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993) (Athe bar against retrospective legislation has traditionally been applied only to substantive laws®); *Wellner v. Director of Revenue*, 16 S.W.3d 352, 355 (Mo. Ct. App. 2000) (Aprohibition against retrospective application of legislation applies only to substantive, and not procedural, laws®) AThe rules which permit change of venue and transfer of cases thereunder are procedural.® *State ex rel. Peabody Coal Co. v. Powell*, 574 S.W.2d 423, 426 (Mo. banc 1978). Being a decision regarding a procedural rule, *Linthicum* is properly applied retroactively to cases filed prior to that decision and currently pending in the State of Missouri. Respondent erred in applying the *Sumners* test to a Missouri Supreme Court decision regarding a procedural rule.

#### THIRD POINT RELIED ON

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE EVEN IF THE SUMNERS THREE-PART TEST COULD BE APPLIED TO THE UNDERLYING CASE, RESPONDENT ERRED IN FINDING THE LINTHICUM DECISION DOES NOT APPLY RETROACTIVELY IN THAT APPLICATION OF THE SUMNERS TEST FAVORS RETROACTIVE APPLICATION.

E. Even If An Analysis Under *Sumners* Is Made, Application Of The

Three-Part Test Favors Retroactive Application

676 S.W.2d 817 (Mo. banc 1984) was to be applied retroactively in determining the division of marital property between the Sumners. *Id.* at 720. The court held the *Hoffman* rule did apply retroactively. *Id.* 

In reaching its decision, the court established and applied the three-factor test regarding retroactive applications of Missouri Supreme Court decisions. *Id.* at 724. The court found, under the first factor, that the *Hoffman* decision Amight be thought to satisfy the threshold for a prospective only operation, in that it overruled decisions by the court of appeals which had adopted the inception of title doctrine. *Id.* However, the court further stated Athe showing is less forceful than might be . . . inasmuch as the superceded decisions are not those of the court of last resort . . . . *Id.* 

In analyzing the second factor, the court found the purpose of the source of funds rule was to Apromote the concept of marital partnership to permit the marital community to share in property which was purchased with marital funds and to prevent sophisticated spouses from converting marital funds into separate property. Id. (citing Hoffman at 824-25.) This factor was found to militate in favor of retroactivity as Athe application of this rule retroactively permits the non-owning partner in the marital property community to participate in the division of property which has already been purchased with marital funds. Id.

Finally, the court found the third factor also favored retroactive application. *See id.* The court found that while the Aowning@spouse may have relied on the Atitle doctrine in ordering his affairs, the goal of such reliance in this context would have been to shield the >non-owning=spouse from sharing that portion of the value of an asset acquired with marital

funds. Id. The court further stated Aby applying the source of funds rule prospectively only, the non-owning spouse would be deprived of any benefit of the funds in effort of the marital community used to enhance the value of the asset. Id. Based on its findings under the three-part test, the court concluded Athat the balance tips strongly in favor of retrospective operation of the Hoffman rule. Id.

Like in *Sumners*, application of the three-part test to the *Linthicum* decision weighs in favor of retroactive application of that decision to the underlying case. In his Order denying Defendants=Motion for Reconsideration, Respondent stated Awhen Plaintiffs amended their Petition, they relied on *State ex rel. Armstrong v. Mason*, which was >good law= at that time. However, plaintiffs=Amended Petition was filed more than a year before the *Armstrong* decision was reached. In filing their Amended Petition, plaintiffs could not have possibly relied on a decision that was not yet made.

Second, the purpose of the *Linthicum* decision will be enhanced by its retrospective application. The purpose of the *Linthicum* rule that venue under '508.010 be determined each time a defendant is added is to protect all defendants regardless of when they are added to the lawsuit. *See Linthicum*, 57 S.W.3d at 858. Absent this rule, different protections would be afforded defendants who are named in the original petition and those named in an amended petition. *See id*. Further, the clear intent of the rule announced in

<sup>7.</sup> The Missouri Supreme Court quashed the preliminary writ of prohibition issued in the *Armstrong* case on November 14, 2000.

Linthicum is to discourage forum-shopping. If venue is based on a plaintiff=s amended petition, the venue Atwo-step@currently being carried out in Missouri courts, and by plaintiffs in this case, will be futile and cases can proceed on their merits and not be delayed by efforts to land them in favored venues.

Application of the third *Sumners* factor also favors retroactive application of *Linthicum*. While plaintiffs in the underlying case may have relied on previous Missouri court decisions when filing their original and Amended Petitions, the goal of such reliance, as in *Sumners*, was improper. Plaintiffs relied on prior precedent simply to validate their efforts to fix venue in a venue plaintiffs believe is more favorable to their cause. Plaintiffs were fully aware at the time the Abandoned Petition was filed of their claims against House, having asserted those claims in the first lawsuit when plaintiffs thought to do so would help them defeat diversity jurisdiction and would allow them to maneuver their way to the state court venue of their choice. No reason exists for their failure to name House in the Abandoned Petition other than to forum shop for a venue they believe to be more favorable to their cause.

#### **FOURTH POINT RELIED ON**

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM
TAKING ANY FURTHER ACTION IN THE UNDERLYING CASE OTHER THAN TO
TRANSFER IT TO A COUNTY WHERE VENUE IS PROPER BECAUSE RESPONDENT
ERRED IN ALLOWING PLAINTIFFS TO REVIVE THEIR ORIGINAL PETITION IN
THAT THE PETITION WAS ABANDONED AND AN ABANDONED PLEADING IS A
NULLITY.

# F0 Respondent Erred In Allowing Plaintiffs To Revive Their Original Petition

Plaintiffs may also argue that, even if venue is improper when *Linthicum* is applied to their Amended Petition, Respondent did not err when he allowed them to revive their Abandoned Petition. Plaintiffs are incorrect. Alt is well settled that when a plaintiff files an amended petition, the original petition is abandoned and becomes a mere \*scrap of paper=insofar as the case is concerned. *Leis v. Massachusetts Bonding & Ins. Co.*, 125 S.W.2d 906, 908 (Mo. Ct. App. 1939). *See also State ex rel. Crowden v. Dandurand*, 970 S.W.2d 40, 342 (Mo. banc 1998) (once plaintiffs file an Amended Petition, they abandon their original Petition); *Weir v. Brune*, 256 S.W.2d 810, 811 (Mo. 1953); *New First National Bank v. C.L. Rhoses Produce Co.*, 58 S.W.2d 742, 744 (Mo. 1932). When an original petition is abandoned, a court never acquires jurisdiction over the parties named in the original petition. *DePaul*, at 870 S.W.2d at 822.

Plaintiffs in the underlying case were permitted, over objection, to revive their Abandoned Petition. There is, however, no rule of civil procedure that allows a party to revive an abandoned pleading nor does there appear to be any decision which allows a party to revive an abandoned pleading under these circumstances. Rather, once a pleading is abandoned, it is

<sup>8.</sup> There is one exception to the rule. When the abandoned pleading is an admission against interest, it may be used to impeach a witness. *Jiminez v. Broadway Motors, Inc.*, 445 S.W.2d 315, 317 (Mo. 1969).

a legal nullity. *Dandurand*, 970 S.W.2d at 342; *Evans v. Eno*, 903 S.W.2d 258, 260 (Mo. Ct. App. 1995) (Awhen an amended petition has been filed the original petition is thereby abandoned and it may not be considered for any purpose. Because plaintiffs= Abandoned Petition is a legal nullity, Respondent erred when he allowed plaintiffs to revive that petition.

#### CONCLUSION

Relators respectfully state that Respondent erred in not applying the decision in *Linthicum* to the underlying case. Plaintiffs Abrought@this suit, for venue purposes, at the time their Amended Petition was filed against both corporations and an individual and, therefore, '508.010 applies to determine venue. Because none of the defendants are residents of Jackson County and the cause of action did not accrue there, venue under '508.010 is improper in Jackson County. Relators request this Court to make its Preliminary Writ permanent and prohibit Respondent from taking any further action on this case other than to transfer it to a county where venue is proper.

Respectfully submitted,

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#### **CERTIFICATE REQUIRED BY RULE NO. 84.06(c)**

The undersigned does hereby certify that this brief complies with Rule 84.06(a), and contains 5,877 words. The undersigned further certifies that a floppy disk containing Relators Brief was filed with this brief in compliance with Rule 84.06(g), and that the disk is virus free.

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#### **CERTIFICATE OF SERVICE**

The undersigned does hereby certify, pursuant to Rule 84.06(g) that (1) a hard copy of the foregoing document in the form specified by Rule 84.06(a) and (2) and a copy of the disk required by Rule 86.06(g), was sent via U.S. Mail, this 5th day of June, 2002, to the individual below. The undersigned does also hereby certify that the disk required by Rule 84.06(g) is virus-free.

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